UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FRANK LOUIS MILES AND JOYCE MILES,

Plaintiff,

v.

ELDON VAIL *et al.*,

Defendants.

Case No. C06-5319FDB

REPORT AND RECOMMENDATION

NOTED FOR:
August 31, 2007

This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Plaintiff is not proceeding *in forma pauperis* and paid the full filing fee (Dkt. # 1).

Before the court is defendant's "response to plaintiff's motion for partial summary judgment and cross motion for summary judgment" (Dkt. # 18). Plaintiffs have not responded (Dkt # 76). The court has reviewed the file and the plaintiff's motion is not in the electronic file. The court cannot consider the plaintiff's motion at this time. If plaintiffs intended to file a motion for partial summary judgment they need to file the motion and explain why it was not filed in a timely manner. This matter is ripe for review on defendant's motion.

FACTS

The denial of extended family visits is the subject matter of this action. Plaintiffs allege the denial of their application for extended family visits at Mc Neil Island was racially motivated (Dkt. # 1). Defendants contend there were three reasons for denial of extended family visits in this case. The first reason is that Mr. Miles was arrested and charged with domestic violence (Dkt. # 18, page 4). The charges were dismissed when the victim failed to appear. The second reason is that Mr. Miles had only been at Mc Neil Island for a short time before he applied for the extended family visits. The final reason for the denial was Mr. Miles assaultive behavior toward other people (Dkt. # 18, Exhibit 2).

Plaintiffs provide no evidence to support their claim of racial discrimination.

Defendants move for summary judgment and argue:

1. Plaintiff has failed to state a claim under the United States Constitution [because there is no right to extended family visits under the Constitution].
2. Denial of Mr. Miles participation does not violate the Equal Protection Clause.
3. Defendants enjoy qualified immunity.
4. Injunctive relief should be denied as Mr. Miles is no longer incarcerated.
5. Lack of personal participation for defendant Spaulding.
6. Dismissal of State law claims.

(Dkt. # 18).

STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim on which the nonmoving party has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985).

There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a

rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56 (e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T. W. Elec. Service Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial, e.g. the preponderance of the evidence in most civil cases. Anderson, 477 U.S. at 254; T.W. Elec. Service Inc., 809 F.2d at 630. The court must resolve any factual dispute or controversy in favor of the nonmoving party only when the facts specifically attested by the party contradicts facts specifically attested by the moving party. Id.

The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in hopes that evidence can be developed at trial to support the claim. T.W. Elec. Service Inc., 809 F.2d at 630 (relying on Anderson, *supra*). Conclusory, nonspecific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990).

DISCUSSION

A. Injunctive Relief.

The court chooses to address the injunctive relief claim first. Plaintiffs ask the court to hold the Extended Family Visit Policy facially invalid. The basic function of injunctive relief is to preserve the status quo ante litem pending a determination of the action on the merits. Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980). A party seeking injunctive relief must fulfill one of two standards, the "traditional" or the "alternative." Cassim v. Bowen, 824 F.2d 791, 795 (9th Cir. 1987).

> Under the traditional standard, a court may issue preliminary relief if it finds that (1) the moving party will suffer irreparable injury if the relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of potential harm favors the moving party; and

> (4) the public interest favors granting relief. . . . Under the alternative standard, the moving party may meet its burden by demonstrating either (1) a combination of probable success and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.

Id. (citations omitted).

In order to seek any form of injunctive relief the plaintiffs must have standing. Mr. Miles has been released from incarceration and he and his wife are no longer subject to the Extended Family Visit Policy. The concept of standing has been carefully analyzed in the Ninth Circuit. To have standing plaintiffs' threat of irreparable injury must be real and immediate, not conjectural or speculative. Nelsen v. King County, 895 F.2d 1248 (9th Cir. 1990). As Mr. Miles has been released from incarceration, the plaintiffs no longer have standing to seek injunctive relief.

The court should not reach the issue of the constitutionality of the policy given plaintiff's lack of standing. The motion for injunctive relief should be **DENIED.** The court recommends Defendant's Motion for Summary Judgment be **GRANTED** on the issue of injunctive relief.

B. Personal Participation.

A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory responsibility or position. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 n.58 (1978). A theory of *respondeat superior* is not sufficient to state a claim under Section 1983. Padway v. Palches, 665 F.2d 965 (9th Cir. 1982). Personal participation is connected to causation. The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts and omissions are alleged to have caused a constitutional violation. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988).

Defendants argue Mr. Spaulding should be dismissed from this action for lack of personal participation (Dkt. # 18, pages 10 and 11). Plaintiff must allege facts showing how individually named defendants caused or personally participated in causing the harm alleged in the complaint. Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir. 1981). A § 1983 suit cannot be based on vicarious liability alone. Plaintiff must allege the defendants' own conduct violated the plaintiff's civil rights. City of Canton v. Harris, 489 U.S. 378, 385-90 (1989). Plaintiffs have not responded to defendant's

motion. The assertion that Mr. Spaulding did not participate in the decision to deny extended family visits to plaintiffs in uncontested. The court recommends Defendant's Motion for Summary Judgment be **GRANTED** on this issue.

C. Equal Protection.

Defendants argue:

> An equal protection claim under the Civil Rights Act, 42 U.S.C. § 1983, requires, as a necessary element, that defendants acted with the intent to discriminate. Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). To sustain an equal protection claim under 42 U.S.C. § 1983, "one must show intentional or purposeful discrimination." Grader v. Lynnwood, 53 Wn. App. 431, 437, 767 P.2d 952 (1989) (emphasis added), review denied, 113 Wn.2d 1001, cert. denied, 493 U.S. 894; Draper v. Rhay, 315 F.2d 193, 198 (9th Cir. 1963) (inmate failed to show § 1983 violation in absence of "intentional or purposeful discrimination"), cert. denied, 375 U.S. 915. This "discriminatory purpose must be clearly shown since a purpose cannot be presumed." Grader, 53 Wn. App. at 437 (emphasis added). Mere evidence of disparate impact on minorities is insufficient. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 256 (1977); Washington v. Davis, 426 U.S. 229, 239-40 (1976).
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> The Equal Protection Clause does not require conditions, practices, and rules at county and state correctional facilities to be identical. Cooper v. Elrod, 622 F. Supp. 373 (N.D. Ill. 1985). The United States Supreme Court has observed that "showing that different persons are treated differently is not enough without more, to show a denial of Equal Protection." Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 230 (1964). In addition, plaintiff must demonstrate that he was "treated differently . . . because [he] belonged to a protected class." Seltzer-Bey v. Delo, 66 F.3d 961, 964 (8th Cir. 1995) (citing Divers v. Department of Corr., 921 F.2d 191, 193 (8th Cir. 1990)).
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> Here, the unequivocal evidence is that none of the Defendants made a decision to deny Plaintiff Frank Miles' EFV applications based upon his or his wife's race. Mr. Miles had only been at MICC for a little over a month in 2002 when he first applied for EFVs and Superintendent Payne did not even know who he was and did not know what race he was or that of his spouse. She denied his applications because he had an arrest for domestic violence. Thereafter, Plaintiff appealed to Mr. Vail, who had the denial of the applications investigated. As with Superintendent Payne, Mr. Vail did not know what race the Plaintiffs were and upheld the denial because of the domestic violence arrest and other assaultive behavior exhibited by Plaintiff.
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> Thereafter, the denials of Mr. Miles' applications were because of the Deputy Secretary's action, not because of Plaintiffs' race. Superintendent Spaulding did not even deny Plaintiffs' EFVs, rather, it was a predecessor, Robert Moore in 2003, and it was because of the Deputy Secretary's previous denial. Similarly, in 2006, Defendants Wesner and Cook did not process Plaintiff's application for EFVs further because of the Deputy Secretary's earlier denial. All of these reasons are legitimate non-discriminatory reasons for denying Plaintiff'. EFVs. At best, even if Plaintiffs' evidence was admissible, it only shows a possible disparate impact which is insufficient to support an equal protection claim. Summary judgment is appropriate.

(Dkt. # 18, pages 9 and 10).

This court agrees with defendant's statement of the law. Plaintiffs provide no admissible evidentiary support for their allegations. Conclusory, nonspecific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990). Defendants are entitled to summary judgment. The court recommends Defendant's Motion for Summary Judgment be **GRANTED** on this issue.

Having reached this conclusion, the arguments regarding qualified immunity and intentional infliction of emotional distress are not addressed. A proposed order accompanies this Report and Recommendation.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **August 31, 2007**, as noted in the caption.

DATED this 30 day of July, 2007.

/S/ *J. Kelley Arnold*
J. Kelley Arnold
United States Magistrate Judge